Supreme Court, U.S.
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No. (1) OFFICE OF THE CLERK

In the

Supreme Court of the United States

LEE CRANMER,

Petitioner,

vs.

TUCSON POLICE DEPARTMENT, CITY OF TUCSON, TYCONIC, INC., CHIEF RICHARD MIRANDA, DET. M. LENARD and JOHN DOE LENARD, OFC. MARK SPELLMAN and JANE DOE SPELLMAN, KATHLEEN DAILY and JOHN DOE DAILY

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a civil litigant, innocent of wrongdoing or bad faith, have relief under Federal Rules of Civil Procedure, Rule 60 (b) (6), from the misconduct or neglect of his attorney when the attorney has, through gross negligence and disability, abandoned his representation of the client, failing to conduct discovery, meet deadlines, or respond to a motion for summary judgment, and that misconduct or neglect has resulted in an adverse ruling on a motion for summary judgment against the client?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.. i

TABLE OF AUTHORITIES. v

PETITION FOR A WRIT OF CERTIORARI. 1

OPINIONS BELOW. 1

JURISDICTION. 1

CONST. AND STAT. PROVISIONS INVOLVED. . . 1

STATEMENT OF THE CASE. 1

STATEMENT OF FACTS. 7

REASONS FOR GRANTING THE PETITION. 11

A. The Ninth Circuit's Memorandum Decision is in Conflict with its Own Published Opinion in Community Dental Service, Inc. v. Tani, and with More Recent Orders and Decisions in the Ninth Circuit and Decisions in Other Circuits. The Ninth Circuit Should Have Stated a Rule Allowing a Litigant to have Relief from the Grossly Negligent Actions of his Attorney, Especially Where the Attorney is Disabled and has Abandoned Not Only the Litigant's Case but Virtually his Entire Practice, Regardless of

Whether the Adverse Result Takes the Form of a Default or a Summary Judgment, When as a Result of the Attorney's Misconduct, the Client's Case is Not Presented to the Court in a Meaningful Way.. 11

B. This Petition Affords the Supreme Court an Opportunity to Address a Question that has Remained Open and Unresolved Since this Court's Opinion in Link v. Wabash Railroad, Which Stated the General Rule that a Client is Accountable for the Negligent Acts or Omissions of his Attorney, but Reserved the Question of Whether Relief Might be Available under Rule 60 (b) (6) and Did Not Address a Situation in Which the Attorney was Grossly Negligent and had Abandoned the Client or his Practice. 15

C. The Petition Should be Granted to Maintain Uniformity Among the Circuits and Resolve Conflicts Between the Result in this Case and the Rule in Other Circuits Over Whether a Client who Suffers Harm to His Case from Attorney Abandonment May Have Relief when that Harm Comes in the Form of a Summary Judgment as Opposed to a Default. 18

CONCLUSION. 20

APPENDIX A. A-1

APPENDIX B. B-1

APPENDIX C. C-1

APPENDIX D. D-1

APPENDIX E. E-1

TABLE OF AUTHORITIES

Cases

American Financial Life Ins. V. Llewellyn, 139 F.3d 664, (9th Cir. 1997). 12

Boughner v. Sec'y of Health, Educ. & Welfare, 572 F.2d 976, (3d Cir. 1978). 12,14

Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, (3d Cir. 1986). 12

Community Dental Services v. Tani, 282 F.3f 1164, (9th Cir. 2002). 6,11,12,13,14,19

Farm Constr. Servic es, Inc. V. Fudge, 831 F.2d 18 (1st Cir. 1987). 19

In re Virginia Information Systems Corp., 932 F.2d 338 (4th Cir. 1991). 19

Jacobs v. Electric Data Sys. Corp., 240 FRD 595 (M.D. Ala. 2007). 19

KPS & Associates v. Designs by FMC, Inc., 318 F.3d 1 (1st Cor/ 2003). 19

Lehman v. United States, 154 F.3d 1010, (9th Cir. 1998). 11

Link v. Wabash RR Co., 370 U.S. 626, (1962). 12,15,16,18

L.P. Steuart, Inc. V. Matthews, 329 F.2d 234 (D.C. Cir. 1964). 12

Pimbs v. United States, 4 Cl.Ct. 366, (1984). 12

Pioneer Invest. Srvs. Co. V. Brunswick Assocs. Ltd. Part., 507 U.S. 380 (1993). 16,18

Reinsurance Co. Of America v. Administrator, 902 F.2d 1275 (7th Cir. 1990). 19

Ringgold Corp. V. Worrall, 880 F.2d 1138,(9th Cir. 1989). 12

Shepard Claims Serv. v. William Darrah & Assocs, 796 F.2d 190 (6th Cir. 1986). 12

Stutson v. United States, 516 U.S. 193 (1996). . . . 18

Suntharalinkam v. Atty.General, 458 F.3d 1034,reh. En banc granted, 479 F.3d 1018 (9th Cir. 2007). . . .14

United States v. Boyle, 469 U.S. 241 (1985). . . 17,18

U.S. v. Cirami, 563 F.2d 26,(2nd Cir. 1977). 15

Rules

Fed.R.Civ.P. Rule 60 (b). 19

Fed.R.Civ.P., Rule 60 (b) (1). 5

Fed.R.Civ.P., Rule 60 (b) (6). 1,5,14,15,16,18

Fed.R.Civ.P. Rule 56 (c). 14

Statutes

28 U.S.C. § 1254 (1). 1

A.R.S. § 13-4051. 10

PETITION FOR A WRIT OF CERTIORARI

Lee Cranmer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions below are unreported. The orders of the courts below are included in Appendices A, B, C, and D.

JURISDICTION

The Court of Appeals entered its judgment on May 14, 2008. See Appendix C.
A timely petition for rehearing and a suggestion for en banc review were filed on June 4, 2008. They were denied on July 2, 2008. See Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves no constitutional or statutory provisions. The text of Fed.R.Civ.P., Rule 60 (b) (6) is attached as Appendix E.

I. STATEMENT OF THE CASE

Petitioner Lee Cranmer, represented by

attorney David Bjorgaard, filed two civil actions against Respondents in Arizona state court in 2003, one making claims under the Fourth Amendment to the U.S. Constitution and the other various state tort claims. Both actions alleged that on April 22, 2002, Petitioner had been wrongfully arrested by Tucson Police Department officer Sgt. Spellman in connection with the arrest and prosecution of his then-wife, Jeanie Herring.[1] Both actions were removed by Respondents to U. S. District Court for the District of Arizona and consolidated into the present case.

Discovery and disclosure were conducted and scheduling orders entered. On July 1, 2004, the District Court set a deadline for expert disclosure. Petitioner timely disclosed the name and address his expert on fraud investigation by law enforcement, and the standard of care for a fraud investigator, but did not disclose any opinions or qualifications as required by the rules. Petitioner's deposition was taken in December, 2004. Mr. Bjorgaard did not conduct any further discovery and did not comply with the requirements for disclosure of expert opinions or qualifications.

Respondents filed motions for summary judgment on December 14, 2004. On Petitioner's motion, the District Court extended the time for his

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[1]Tyconic, Inc., a private flight school, was named because Spellman had been acting as an employee of the school at the time he arrested Cranmer, and Spellman had held Cranmer on the school premises for several hours, with the approval or acquiescence of his employer.

response to February 11, 2005. The date came and went with no response. Respondents filed motions for summary disposition of the motions. Bjorgaard did not respond to these motions either.

For several months, nothing more happened in the case and the District Court took no action on the motions. It appears that Bjorgaard simply stopped working on the case during that time. In late May, 2005, Cranmer contacted his attorney and learned for the first time that a response had not been filed. Bjorgaard filed a response to one of the motions on June 2, 2005. The District Court, on its own motion, struck the response as untimely. A response to the other motion for summary judgment was filed thereafter. These responses argued the facts adduced by Respondents but did not set forth any additional facts or present any additional evidence.

Petitioner, still represented by Bjorgaard, filed a motion to reconsider the order to strike, and on June 18, 2005, the District Court granted the motion, vacated its order, and directed Bjorgaard to file a memorandum showing cause why the responses should not be stricken.[2]

Bjorgaard filed his memorandum on July 1, 2005, explaining that the failure to file a timely response was entirely due to personal problems in his

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[2]Present counsel associated with Mr. Bjorgaard on June 22, 2005, and later substituted for him.

life and was not in any way the fault of his client. Bjorgaard cited the fact that he had twice been the victim of crime, that his ten-year old son had been ill, that he had lost money in a financial transaction and was having financial difficulties, and that he had been having emotional problems and had sought help through the Member Assistance Program of the Arizona State Bar. He pointed out that he was attempting to correct the situation by associating with new counsel. He also requested, as an alternative to striking the responses, that the court consider imposing a sanction on him personally that would not harm his client.

On September 27, 2005, the District Court entered an order striking Petitioner's responses to the motion for summary judgment and granting the motions. See Appendix A[3] The court indicated it would have granted the motions even if it had considered the responses, because Appellant did not offer any facts or evidence beyond those set forth in Appellees' motions. Final judgment was subsequently entered in favor of Respondents as to all issues.

On October 7, 2005, Petitioner, through present counsel, filed his Motion for New Trial, Motion to Correct or Amend Judgment, Motion for Relief from Judgment Under Rule 60 (b), and Alternative Motion to Reconsider. The motion was accompanied by exhibits, including the affidavit, report, and CV of the

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[3]The order is dated September 12, 2005, but was not filed until September 27, 2005.

expert whose identity had previously been disclosed, excerpts of Petitioner's deposition, and a grand jury transcript. The motions sought relief on several grounds, including excusable neglect under Fed.R.Civ.P., Rule 60 (b) (1) and "extraordinary circumstances" (attorney abandonment) under Rule 60 (b) (6).

On May 9, 2006, Petitioner filed a motion for leave to amend or supplement the motion for new trial, attaching orders and dockets from the District Court and from Arizona state courts involving Bjorgaard's actions in other cases during the relevant time period. Petitioner argued that Bjorgaard's failure to file timely or complete oppositions to the motions for summary judgment constituted "gross negligence" and "attorney abandonment," and established grounds for relief under Rule 60 (b) (6). Attached to this motion was the affidavit of one of Petitioner's present attorneys, detailing his conversation with Bjorgaard regarding Bjorgaard's disabilities, including depression and anxiety, for which he was under treatment. The materials included records from other cases being handled at about the same time by Bjorgaard, in which Bjorgaard had been sanctioned for failure to file responses, appear for hearing, or meet deadlines. The motion to supplement requested that the court consider these materials, grant time for additional investigation, and set a hearing so that this evidence of abandonment could be developed further. Additional such materials were submitted on May 26, 2006. These materials showed that Bjorgaard had virtually abandoned his practice during in late 2004, early 2005.

On July 7, 2006, without hearing or oral argument, the District Court entered its order denying the motion for new trial, denying relief on all grounds, including attorney abandonment and manifest injustice under Rule 60 (b), and denying Petitioner's motions for leave to amend or supplement. See Appendix B.

On July 27, 2006, Petitioner filed a timely appeal to the U.S. Court of Appeals for the Ninth Circuit. In the course of the appeal, the Court of Appeals took judicial notice of the fact that, in 2007, removal proceedings had been initiated by the Court following Bjorgaard's suspension from the practice of law in Arizona, that Bjorgaard had failed to respond to those proceedings, and that he had been disbarred from practice before the Ninth Circuit.

On May 14, 2008, following oral argument, the Court of Appeals issued an unpublished Memorandum disposition, ruling that the District Court had not abused its discretion by denying Petitioner's Rule 60 (b) motion. See Appendix C, p. 3. On the attorney abandonment issue, the Court of Appeals stated that because the District Court had "entered judgment on the merits of the case," Petitioner was not entitled to relief. The Court of Appeals distinguished on this basis its own decision in Community Dental Services v. Tani, 282 F.3f 1164, 1169 (9th Cir. 2002). See Appendix C, pp. 5, 6.

On June 4, 2008, Petitioner filed a timely

petition for panel rehearing and a suggestion for for en banc rehearing. The petition was denied and the suggestion rejected on July 2, 2008. See Appendix D. This Petition for Certiorari followed.

II. STATEMENT OF FACTS

In early 2002, Petitioner Lee Cranmer entered into what he believed was a valid marriage with Jeanie Hering. Petitioner was beginning a promising career in medicine in Arizona. He held an undergraduate degree from Harvard and a medical degree from the University of San Diego, and had served a residency at the Mayo Clinic in Rochester, Minnesota. He was licensed to practice medicine in Arizona and was employed as a Fellow at the Arizona Cancer Center at the University of Arizona. He also worked at the VA Hospital in Tucson. Dr. Cranmer's personal life was above reproach. He had excellent credit, no criminal history, and had never been in trouble with the law.

Hering seemed to be a suitable match, a stable, well respected, well dressed person with a good job. As it later developed, she was in fact a relentless con artist, a convicted felon who had served federal prison time, a "deadbeat" who had numerous civil judgments against her for unpaid debts, and a bigamist who had "married" Cranmer without bothering to divorce her previous husband.

In late 2001, Dr. Cranmer had begun to suspect that he might be the victim of fraud. Problems began to develop with several of his bank accounts and a

bank account of his mother's for which he served as trustee. He stopped receiving statements and his account was overdrawn. Charges began to appear on an inactive credit account. He contacted the bank and learned that bad checks were being deposited into his account. He requested a fraud packet so he could make a formal report. Over the next several months, he made repeated efforts to get to the bottom of the apparent fraud. He made trips to the bank and eventually obtained materials indicating someone was defrauding him. He made fraud reports to the bank and reports to the police. He contacted the broker for his mother's trust account to alert him to possible fraud.

In March, 2002, Cranmer began taking flight lessons from Tyconic, Inc. His flight instructor was Mark Spellman, who was also a police officer with the City of Tucson Police Department. The lessons were arranged by Hering as a gift.

Cranmer did not suspect Hering of wrongdoing. She claimed to be a victim, too, and he had no reason to doubt her. She made extraordinary efforts to throw him off her trail, giving him false information about Secret Service and FBI investigations of the fraud and taking him to see a lawyer. At one point, she even claimed that the people who had been defrauding them had been caught in Nevada.

It was not until April 18, 2002, that Hering's facade of innocence began to crumble. Cranmer discovered that a check from the back of his check book on a credit union account had been used over his

forged signature. He reported the incident to the police and closed the account. This made him suspect Hering because no on else had access to these checks. He contacted the cruise line he and Hering had used for their honeymoon and learned there was fraudulent activity on the credit card account Hering had used to book the cruise. On April 21, he discovered that Hering had had calls to his cell phone forwarded without his knowledge.

On April 22, after working all night at the VA Hospital, Cranmer realized that if all of the transactions entered into by Hering were fraudulent, her "gift" of flight lessons might be as well. He called Tyconic and spoke to Spellman. Spellman told him the Tyconic bill had not been paid. Cramer told Spellman he would be down to pay it that morning. He obtained a cashier's check and met Spellman at Tyconic to pay the bill in full.

Spellman accepted Cranmer's payment and then told Cranmer he was now acting as a sergeant of the Tucson Police Department. He directed Cranmer to step into a room at the school and to sit in a chair. He asked him if he had any dangerous items in his pockets. In answer to Cranmer's question whether he was under arrest, Spellman told Cranmer he was being "legally detained." He told Cranmer he was going to call a detective. He then tried to take Cranmer's statement. He held Cranmer in the room for three hours, coming in and out, asking questions, and making accusations. Spellman accused Cranmer of committing crimes, questioned whether Cranmer was a "real doctor," and did everything he could to

humiliate, frighten, and induce him to confess to a crime. Eventually, Spellman arranged for Cranmer to be taken into custody by the Tucson Airport Authority Police, who transported him to jail and the courthouse, where he was released.

A preliminary complaint for fraudulent schemes and artifices and other serious crimes was filed against Dr. Cranmer in state court, but he was never formally charged. At the grand jury proceedings in Hering's case, conducted eleven days after Cranmer's arrest, Tucson Police Department Detective Lenard testified that the most she could say was that Dr. Cranmer "might or might not" be aware of the fraudulent nature of the payments to Tyconic. She was unable to point to any specific information concerning his possible knowledge of (much less involvement in) this transaction. Hering was arrested, charged, convicted, and eventually sentenced to state prison. Cranmer was recognized as a victim of Hering and was eventually able to seal but not expunge his arrest record and record of the preliminary charges. In these proceedings, state court judges found that, pursuant to A.R.S. §13-4051, Petitioner had been wrongfully arrested and charged. Eventually, after Cranmer's investigator discovered Hering was also a bigamist, Petitioner was able to have his "marriage" annulled and declared void.

As noted, Petitioner's attorney did not take any depositions or obtain a report from an expert. Present counsel did obtain a report from an expert, after the motions for summary judgment had been granted, and provided the expert's report to the District Court in

support of the motion for new trial, etc. That expert, a fraud examiner with 30 years experience, was prepared to testify that Spellman lacked probable cause to arrest Plaintiff on April 22, 2002, and that the police investigation was improperly conducted, insufficient, and biased.

III. REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Memorandum Decision is in Conflict with its Own Published Opinion in Community Dental Service, Inc. v. Tani, and with More Recent Orders and Decisions in the Ninth Circuit and Decisions in Other Circuits. The Ninth Circuit Should Have Stated a Rule Allowing a Litigant to have Relief from the Grossly Negligent Actions of his Attorney, Especially Where the Attorney is Disabled and has Abandoned Not Only the Litigant's Case but Virtually his Entire Practice, Regardless of Whether the Adverse Result Takes the Form of a Default or a Summary Judgment, When as a Result of the Attorney's Misconduct, the Client's Case is Not Presented to the Court in a Meaningful Way.

Fed.R.Civ.P., Rule 60 (b) (6) allows the District Court to grant relief for any reason justifying relief from the judgment. This provision includes situations in which "extraordinary circumstances" beyond a party's control have prevented the party from protecting his interests. Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998). In the Ninth Circuit and others, this broad standard has been held to

include relief from a party's attorney's misconduct when that misconduct rises to the level of gross negligence. Community Dental Services v. Tani, supra. See also Boughner v. Sec'y of Health, Educ. & Welfare, 572 F.2d 976, 978 (3d Cir. 1978), Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 806 (3d Cir. 1986), Shepard Claims Serv. v. William Darrah & Assocs, 796 F.2d 190, 195 (6th Cir. 1986), L.P. Steuart, Inc. v. Matthews, 329 F.2d 234, 235 (D.C. Cir. 1964), and Pimbs v. United States, 4 Cl. Ct. 366, 370 (1984).

The general rule is that clients are charged with their attorney's negligent acts and are considered to have notice of all facts known by their lawyer. Link v. Wabash RR Co., 370 U.S. 626, 633-34 (1962); Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141-42 (9th Cir. 1989). The Ninth Circuit has held, however, that where the attorney's actions go beyond mere negligence and constitute "gross negligence," a client should be relieved of the effects of his attorney's misconduct. This principle, which has been adopted by several circuits, was initially recognized in American Financial Life Ins. v. Llewellyn, 139 F.3d 664, 666 (9th Cir. 1997). In Community Dental v. Tani, supra, the Ninth Circuit explicitly held that "when a client has demonstrated gross negligence on the part of his counsel, a default judgment against the client may be set aside pursuant to Rule 60(b)(6)," reversing the District Court for abuse of discretion. In that case, Tani's attorney had "virtually abandoned" his client, filing an answer two weeks late, failing to serve it, and failing to file an opposition to the other side's motion to strike the answer, all while assuring his client that the case was proceeding normally.

By focusing on the method by which the harm was accomplished rather than the conduct of the attorney and the innocence of the client, the Ninth Circuit's Memorandum disposition illogically and unduly limited the scope of this remedial rule. The rationale in Tani and other cases was that: (1) the rule was remedial and must be liberally applied; (2) cases should be decided on the merits whenever possible; and (3) when an attorney is grossly negligent, the legal system loses credibility if "an innocent party is forced to suffer drastic consequences." The Ninth Circuit also reasoned in Tani that if the gross negligence "results in the client receiving practically no representation at all" the agency relationship is vitiated. None of these reasons has anything to do with whether the harm takes the form of default judgment or a summary judgment. Obviously, from the client's perspective, the difference is meaningless.

Three of these considerations clearly apply with equal or greater force in Petitioner's case. Indeed, Bjorgaard's conduct went beyond merely missing a deadline by a few weeks and failing to serve an answer. Bjorgaard conducted no discovery over a period of many months, did not obtain or disclose the opinions of an expert, and then waited over three months to file his response to the motions for summary judgment, even though Respondents had filed motions for summary disposition. He filed something only because his client learned of the failure and prompted him to do so. What Bjorgaard filed was a "bare bones" response that added no new facts or evidence, not even

evidence like the grand jury transcript or his client's deposition that were in his possession.

Further, as applied to the facts of the present case, the distinction between a default and summary judgment, on ground that the latter is really a "decision on the merits," is false. Therefore, the fourth consideration, the preference for a judgment on the merits, also applies. The District Court had before it so little from Petitioner that the adverse result was all but preordained. Although the District Court stated that it was following the requirements of Fed.R.Civ.P., Rule 56 (c), it did so on a record devoid of any of the information and evidence Petitioner could have presented if his attorney had not abandoned him. See Exhibit A.

The Memorandum decision in this case unduly limits a remedial rule adopted by the Ninth Circuit, as well as the Second, Third, Sixth, and Federal Circuits (see below). It is in conflict not only with Tani, but with the way that decision is interpreted in the Ninth Circuit. See Suntharalinkam v. Attorney General, 458 F.3d 1034, reh. en banc granted, 479 F.3d 1018 (9th Cir. 2007) (dissent). This Petition affords the Supreme Court an opportunity to adopt a broadly remedial reading of Rule 60 (b) (6) that will increase respect for the judicial system and recognize that it is the interests of litigants in a decision on the merits that should take precedence.

Other Circuits have granted relief from summary judgment for an attorney's gross negligence or abandonment of clients. In Boughner, supra, the

Third Circuit held that where an attorney, who also committed misconduct in other cases, engaged in "neglect so gross it is inexcusable" including failing to respond to a motion for summary judgment, "entry of summary judgment precluded an adjudication on the merits of appellant's case" and relief was warranted. In U.S. v. Cirami, 563 F.2d 26, 34 (2nd Cir. 1977), a showing by the appellants that their attorney had abandoned them and other clients due to mental illness justified relief from summary judgment.

B. This Petition Affords the Supreme Court an Opportunity to Address a Question that has Remained Open and Unresolved Since this Court's Opinion in Link v. Wabash Railroad, Which Stated the General Rule that a Client is Accountable for the Negligent Acts or Omissions of his Attorney, but Reserved the Question of Whether Relief Might be Available under Rule 60 (b) (6) and Did Not Address a Situation in Which the Attorney was Grossly Negligent and had Abandoned the Client or his Practice.

In Link v. Wabash RR Co., 370 U.S. at 633-34 (1962), this Court considered whether a client should have relief from the actions or omissions of his attorney. Although the Court stated the general rule that litigants are generally chargeable with their attorney's conduct, having chosen them as agents, that opinion was limited in two ways.

First, the conduct of the attorney Link did not rise above the level of negligence. He missed a single pre-trial conference, after which the petitioner's case was dismissed. There was no evidence that he had abandoned the case entirely, become disabled, or abandoned his practice. This is a significant difference. The lower court cases which have crafted exceptions to the general rule have done so in part because the conduct of the attorneys was so egregious as to negate the agency principles on which the rule is based. Petitioner's case presents an excellent opportunity to consider the limits of Link on a record in which the egregiousness of the attorney conduct is manifest: The record in this case demonstrates that Bjorgaard took no action for several months, took no action until he was prompted by his client, failed to respond to a dispositive motion, filed an inadequate response, and conducted no discovery, thereby predetermining an adverse result for Petitioner. Moreover, the record is also replete with information concerning Bjorgaard's abandonment of other clients in similar circumstances.

Second, the petitioner in Link argued only that the District Court had abused its discretion by dismissing for failure to prosecute under Rule 42. He did not raise Rule 60 (b). This Court found no abuse of discretion, but expressly declined to state whether it would have reached a different result if the petitioner in that case had "sought to avail himself of the escape hatch provided by Rule 60 (b). " Link, 370 U.S. at 635-36.

This Court considered a related issue under

Rule 60 (b) (1) in Pioneer Invest. Srvs. Co., v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 393 (1993). In that case, the Court upheld relief for a bankruptcy claimant whose attorney had missed filing a claim by a bar date. This Court held that "excusable neglect" under Rule 60 (b) (1) encompassed situations in which a party's attorney was negligent or otherwise at fault. See also Stutson v. United States, 516 U.S. 193 (1996) (applying rule of Pioneer Investment to Fed.R.Crim.P., Rule 4, to uphold relief for criminal defendant whose attorney filed his notice of appeal one day late). However, in reaching this conclusion, this Court took exception to the suggestion by the Eleventh Circuit that it would be inappropriate to penalize litigants for the omissions of their attorney. This Court restated the rule of Link and emphasized that the proper focus was whether the conduct was excusable. See also United States v. Boyle, 469 U.S. 241 (1985) (client could be penalized for attorney's late filing of tax return).

In none of these cases, however, has this Court been confronted with the issue of whether in a civil case, when an attorney's misconduct rises far above the level of negligence, and the attorney-client relationship is for all practical purposes negated by the attorney's neglect or disability, the client should have relief. This is a question of growing importance as litigation becomes more complex and clients become more reliant on their attorneys. It is an issue with direct ramifications for the esteem and trust the public can be expected to place in the legal system during a time when the reputation of that system is increasingly under assault.

The Supreme Court now has an opportunity to declare a general rule in a matter of first impression before this Court. By fashioning a rule that will allow deserving litigants to avoid the harsh results that occur when they are virtually abandoned by their attorneys, this Court can foster greater fairness in litigation and greater respect for the legal system. Such a rule will also recognize the realities of modern litigation in which all but a few civil litigants in the federal courts are represented by attorneys and depend on the honesty, competence, and diligence of their attorneys to navigate an increasingly complex legal system. This rule would be consistent with the underlying principles in Pioneer Investments Services and Stutson and would allow this Court to harmonize those decisions with the holdings in Link and Boyle.

C. The Petition Should be Granted to Maintain Uniformity Among the Circuits and Resolve Conflicts Between the Result in this Case and the Rule in Other Circuits Over Whether a Client who Suffers Harm to His Case from Attorney Abandonment May Have Relief when that Harm Comes in the Form of a Summary Judgment as Opposed to a Default.

Despite a trend in favor of more liberal interpretation of Rule 60 (b) (6) and in favor of relieving clients from the misconduct of their attorneys, see Pioneer Investment Services, supra, and Stutson, supra, there remains a serious split between the circuits on the issue whether and under what circumstances a client may have such relief. Whereas the Second, Third, Sixth, and Federal Circuits, and the

Court of Claims appear to have adopted a rule allowing such relief under some circumstances (see above), and the Fourth Circuit allows relief where the attorney's misconduct amounts to disloyalty or seriously misleading the client, see In re Virginia Information Systems Corp., 932 F.2d 338 (4th Cir. 1991), the First, Seventh and Eighth Circuits appear to reject the possibility of such relief. See KPS & Associates v. Designs by FMC, Inc., 318 F.3d 1 (1st Cir. 2003) (rejecting Tani), citing Farm Constr. Services, Inc. v. Fudge, 831 F.2d 18, 21 (1st Cir. 1987); Reinsurance Company of America v. Administrator, 902 F.2d 1275 (7th Cir. 1990). See also Jacobs v. Electric Data Sys. Corp., 240 FRD 595 (M.D. Ala. 2007) (complete failure of attorney to provide representation amounting to collapse of attorney-client relationship may form basis for relief under Rule 60 (b).

Such an important aspect of the relationship between an attorney and client should not depend on a geographical accident. This Court should declare a single rule to govern this aspect of civil litigation in the federal courts. That rule should permit a client, such as Dr. Cranmer, who is the blameless victim of serious attorney misconduct to have his day in court.

IV. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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